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Fourth Circuit Holds ADA Requires Expanded Access to Aural Content in Stadiums

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In *Feldman v. Pro Football, Inc.*, __ F.3d __, Nos. 09-1021, 09-1023 (4th Cir., March 25, 2011), the United States Court of Appeals for the Fourth Circuit affirmed the ruling of the United States District Court for the District of Maryland and held that, to provide full and equal enjoyment of the entire entertainment experience of a sporting event in a stadium, FedEx Field must provide individuals, who are deaf or have a hearing impairment, with the auxiliary aids and services necessary to benefit from the content broadcast over the stadium's public address ("PA") system during Washington Redskins home games. This content includes: game-related information; emergency information; advertisements; public service announcements; and song lyrics. The Fourth Circuit did not hold that song lyrics must be captioned. Instead, the Court recognized that places of public accommodation are entitled to select the means of achieving full and equal enjoyment and effective communication and that an individualized and contextual assessment will be required to determine the appropriateness of the chosen auxiliary aid.

Background

Plaintiffs include fans who are deaf or significantly hearing-impaired, and regularly attend Washington Redskins football games at FedEx Field in Landover, Maryland. Plaintiffs are unable to benefit from the use of the Assistive Listening Devices available at FedEx Field. Therefore, in 2003, Plaintiff Feldman contacted FedEx Field about obtaining alternative auxiliary aids or services that would provide him with greater access to the information broadcast over the PA system. Despite a variety of offers for additional auxiliary aids at FedEx Field, the parties could not reach an agreement and, on August 31, 2006, the Plaintiffs (with assistance from the National Associate of the Deaf) sued in the United States District Court for the District of Maryland alleging that Defendants violated Title III of the Americans with Disabilities Act ("Title III") by refusing to caption the Jumbotron and video monitors at FedEx Field.

Within weeks of the lawsuit being filed, FedEx Field began captioning a robust amount of content – including emergency evacuation and game information, public service announcements, and advertisements – on its two light-emitting diode ribbon boards ("LED Boards") on each side of the stadium. FedEx Field also began providing captioning on the televisions located throughout its concourses. These services are still provided to this day with the intention of being provided indefinitely.

The District Court's Decision

On summary judgment, the Defendants contended that the case was moot because FedEx Field was providing captioning of safety and game information and would continue to do so indefinitely. Plaintiffs argued that a live controversy remained because not only could FedEx Field cease to provide the captioning at any time, but it still did not caption certain content, including music lyrics. The District Court concluded that the case was not moot both because Defendants' voluntary provision of captioning did not satisfy the heavy burden to prove that ADA violations would not recur and the need to caption song lyrics remained an unresolved issue.

Therefore, moving forward on the substantive Title III issue, the District Court held that the ADA requires the Defendants to provide auxiliary aids for the aural content broadcast over FedEx Field's PA system, including music lyrics. Acknowledging that the ADA does not dictate specific auxiliary aids, the District Court refrained from requiring that FedEx Field provide captioning as the means of access to music lyrics.

The Fourth Circuit's Decision

On appeal to the Fourth Circuit, Defendants maintained that the District Court erred in its rulings – that Plaintiffs' claims were not moot; and that the ADA requires Defendants to provide auxiliary aids for aural content broadcast over FedEx Field's PA system (taking particular issue with the need to caption music lyrics). The Fourth Circuit affirmed the decision of the District Court on both counts.

The Burden Public Accommodations Face To Establish Mootness

In affirming the lower court's rejection of Defendants' mootness argument, the Court explained that a "case may remain live even if the events giving rise to the lawsuit cease." (Id. at *13) The exception to this rule requires defendants to establish that there is "'no reasonable expectation that the wrong will be repeated.'" (Id.) According to the Court, that burden is required because otherwise defendants would be free to simply return to their prior behavior after the lawsuit was dismissed.

While the Court commended the efforts at FedEx Field in providing auxiliary aids, it still found that Defendants had not met the standard necessary to establish that Plaintiffs' claims were moot. In reaching that decision, the Court focused on the fact that Defendants "maintain complete control over the captioning" and could eliminate it with great ease. (Id. at *14)

Providing Auxiliary Aids to Access Aural Content

Recognizing that determinations under the ADA are driven by context and require highly individualized inquiries, the Court's holding on the substantive ADA issue can be construed narrowly. The Court held that, to provide full and equal enjoyment, "in the context of a professional football game at a large stadium like FedEx Field" auxiliary aids, beyond Assistive Listening Devices, are required to convey the following content when broadcast over the PA system: (i) game-related information; (ii) emergency and public address announcements; and (iii) the words to music and other entertainment. (Id. at *23)

The genesis of the Court's conclusion is Title III's mandate that places of public accommodation provide individuals with a disability with the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations." 42 U.S.C. § 12182(a). A place of public accommodation violates Title III if it fails to provide auxiliary aids and services – which may be necessary to ensure effective communication for individuals with disabilities – unless it can demonstrate that taking such steps would fundamentally alter the nature of the goods, services, facilities, privileges or would result in an undue burden. 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303(c).

Based upon these precepts, the Court held that for fans who are deaf or have hearing impairments to obtain full and equal enjoyment at FedEx Field, they must have access to the aural content that is provided over the PA system. The Court explained that each primary type of aural content provides fans with a specific value that is part of fully and equally enjoying the experience at FedEx Field. For example, emergency instructions help alleviate stress that would come from otherwise being unclear on how to reach safety, while advertisements and public service announcements inform fans about the team's interests and what products and causes it deems worthy of endorsement. In concluding that full and equal enjoyment also requires access to the lyrics to music, the Court adopted the District Court's rationale that a football game at FedEx Field was "more than a football game," it was an "entertainment experience" of which the music plays a significant role (e.g., by "fostering a sense of shared participation"). (Id. at *24).

Places of Public Accommodation Remain Free To Select Its Auxiliary Aids and Services

As did the District Court below, the Court did not hold that FedEx Field had to provide a specific type of auxiliary aid or service – such as captioning – to ensure access to music lyrics. Indeed, the Court fully acknowledged that the auxiliary aid requirement is a flexible one because how a place of public accommodation can provide effective communication will "vary with context." (Id. at *25). Similarly, the Court noted that "'full and equal enjoyment' is not so capacious as to 'mean that an individual with a disability must achieve an identical result or level of achievement as persons without a disability.'" (Id.)

In this case, Defendants opted to make the lyrics to songs played over the FedEx Field PA system at Washington Redskin home games available to fans by e-mailing the full lyrics of songs that might be played during the games to fans in advance of game day, upon request. Plaintiffs did not challenge this decision.

The Dissent

As the Fourth Circuit is the first circuit court to directly address this issue, it is worth briefly addressing the well-reasoned dissenting opinion, authored by Chief District Judge Beaty.

The dissent's primary point of contention was that the majority opinion erred by endorsing a broad declaratory judgment that requires full and equal enjoyment of all aural content broadcast over the PA system instead of a narrower one that held that some sort of auxiliary aid must be provided at FedEx Field (beyond Assistive Listening Devices) unless an undue burden or fundamental alteration could be established. (Id. at *30, 34). If the majority had issued such a narrower ruling, the subsequent inquiry would have been on whether the auxiliary aids and services provided at FedEx Field are sufficient to ensure effective communication for fans who are deaf or have a hearing-impairment. (Id. at *30).

The dissent cautioned that by issuing such a broad ruling, the majority opinion failed to address the more pressing issue – the degree of effectiveness of the variety of auxiliary aid options that are, or could be, adopted for use at FedEx Field (e.g., captioning (on the Jumbotron, LED boards, and/or televisions); handheld devices; or providing written copies of lyrics in advance). Indeed, in his dissent, Chief District Judge Beaty noted that he is of the opinion that "the captioning that was provided on the LED boards and in the concourse area, were sufficient to result in effective communication, even if Defendants did not provide word-for-word captioning of the songs in the cheerleader's dance routines." (Id. at *36). Moreover, the dissent acknowledged that even if some form of captioning is appropriate at FedEx Field it does not necessarily mean it is required at all stadiums, as other auxiliary aids could also sufficiently achieve effective communication in other contexts. (Id. at *37).

Looking Ahead

Places of public accommodation should be concerned by the Fourth Circuit's analysis that just because a certain requirement is not specifically set forth in the statute or its voluminous regulations does not mean that someone cannot assert a claim under general theories such as "full and equal enjoyment" or "effective communication."

While the Court's decision – on its face – might be read by some advocates as a broad interpretation of Title III's "full and equal enjoyment" obligation, its ultimate impact should be limited by a variety of factors. First, the decision on the merits is actually extremely narrow. Indeed, it is limited to the context of a professional football game at a large stadium like FedEx Field and focuses on aural content broadcast over the PA system. Second, even for comparable venues, the Court refrained from requiring that the stadium provide a specific auxiliary aid or service to provide the requisite level of access. The holding places that decision in the hands of the stadium. These limitations both stem from the Court's acknowledgement that Title III inquiries require highly individualized context-specific assessments. Therefore, this decision leaves room for all other places of public accommodation to distinguish their situations from that at FedEx Field and to determine what auxiliary aids are appropriate at their venue.

At a minimum, stadiums in the Fourth Circuit that cannot be distinguished from FedEx Field must now provide individuals who are deaf or have a hearing impairment with access to a variety of aural content that is broadcast over PA systems, including: game-related information; emergency and public address announcements; and the words to music and other entertainment. To determine how this access should be provided, each venue should consider adopting temporary pilot programs that will enable them to examine options for effectively providing full and equal enjoyment within the context of each stadium's operations.

For all venues located outside of the Fourth Circuit this decision is non-binding. Notwithstanding, it would not be surprising to see advocacy groups (such as the National Association of the Deaf) and individuals attempt to use this decision to obtain similar results at a variety of places of public assembly (beyond just large stadiums) throughout the country (whether via private agreements or litigation). With that in mind, all venues should review their current policies and existing auxiliary aids relating to providing access to aural content to individuals who are deaf or have a hearing impairment and consider whether any modifications might be appropriate.

There is one other important takeaway from this decision, relating to the Court's rejection of Defendants' mootness argument. One issue that lurks in the background of many Title III litigations is attorneys' fees. Following the Supreme Court's decision in *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001), which held that for a party to recover attorneys' fees it must obtain court-ordered relief, in traditional Title III "brick and mortar" cases (where the allegations focus on an alleged lack of physical access – no ramps, counters too high, etc.), the option has always existed for defendants to take the necessary corrective measures prior to the entry of a judgment to preclude plaintiffs' recovery of attorneys' fees. The Fourth Circuit's decision here, however, suggests that even when a defendant makes voluntary corrective measures in an auxiliary aid case, because some of those aids could be theoretically removed with ease, the case will probably not be deemed moot and, therefore, attorneys' fees would remain in play.